

March 10, 2003

Mattie C. Condray
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Office of Legal Affairs
Legal Services Corporation
750 First Street, NE
Washington, DC 20002-4250

Via Electronic Mail: mcondray@lsc.gov

Re: LSC Limited English Proficiency Guidance – Request for Comments

Dear Ms. Condray:

Community Legal Services is a legal aid organization that has provided free legal services to low-income individuals and communities in Philadelphia for more than thirty-five years. Although we have not been funded by LSC since 1995, we have strong affiliations with many LSC funded organizations, including our sister agency Philadelphia Legal Assistance.

Our clients come from diverse cultural and linguistic backgrounds. In recent years, Philadelphia has benefitted from dramatically growing numbers of immigrants from Eastern Europe, Asia, Southeast Asia, Africa, and Central and South America. Philadelphia is also home to a large Spanish-speaking Puerto Rican community. In fact, according to Census data, one in six Philadelphians age five or older speak a primary language other than English. We regularly see clients with limited English proficiency (LEP) whose primary language is Spanish, Russian, Ukrainian, Mandarin, Cantonese, Cambodian, Korean, Vietnamese, and Haitian-Creole, and serve less frequently clients from a wide range of other language backgrounds. Many of these clients' legal problems either stem from or are compounded by language barriers.

Census figures show similar dramatic growth in the immigrant and LEP population nationwide. The percentage of the population that is foreign born has doubled since the early days of legal services and increased by over 50% between 1990 and 2000. About one third of the Asian population arrived in the 90's and another third arrived previously from foreign countries. Significant LEP populations are no longer confined to the east and west coasts or big cities. Many localities are encountering such populations for the first time. Particularly after the mergers of many LSC programs, it would be surprising if many programs do not have a significant number of LEP people within their client-eligible populations.

In 1999, CLS implemented an organization-wide Language Access Project, which aims to strengthen and expand the agency's work with limited-English communities. As a sub-recipient of

federal funds (from DHHS), CLS is itself likely covered by Title VI's prohibition against national origin discrimination. We have focused significant attention on improving our own capacity to ensure that limited English clients have meaningful access to our services, and engaging in advocacy for these clients when they encounter language barriers to obtaining services from other agencies. Our comments to LSC therefore flow not only from our perspective as an advocate for low-income LEP persons but also from our perspective as a provider that has grappled with the question of how to provide services to clients which are both linguistically appropriate and cost-effective.

1. THE CURRENT SITUATION CALLS FOR IMMEDIATE IMPROVEMENT

We commend LSC for finally focusing its attention on this important issue. This attention is sorely needed.

Many LSC programs are making strides in improving the accessibility of their services to LEP clients. For example, Philadelphia Legal Assistance has developed special projects focused on outreach to and representation of domestic violence survivors who speak Spanish and Asian languages. As part of these initiatives, PLA has hired bilingual and bicultural staff to serve as casehandlers, interpreters and translators, and has supplemented in-house staff through contracts with professional language services. The result has been to increase both the quantity and quality of legal services provided to eligible clients in great need of PLA's support. Other programs are providing leadership in serving LEP clients and demonstrating that different approaches can achieve a common goal.

However, in our experience, most LSC programs in the country have yet to put systems into place that would enable them to make their programs accessible to LEP clients. Indeed, many programs have not yet begun the process of upgrading their services. Staff from CLS' Language Access Project have been asked by several groups of LSC organizations to provide workshops on improving accessibility to LEP clients. What has struck us most is the wonderment expressed by many programs that they are required to shoulder the responsibility of overcoming language barriers with clients to ensure meaningful access. We have created a rudimentary self-assessment tool (see appendix 1) that we use at the beginning of our workshops to assist participants in evaluating their own program's practices. The survey asks what would seem to be basic questions about a program's capacity to effectively serve LEP clients. The general reaction to this survey has been one of embarrassment on behalf of the participants: most acknowledge that their programs have not taken basic steps towards making a program accessible. In particular, many programs:

- Have not assessed which foreign languages they most frequently encounter in the client community.
- Do not track LEP status in a full range of languages in their client database systems.
- Do not have a written policy outlining how the program provides services to LEP clients (other than a more general non-discrimination policy).

- Encourage clients to provide their own interpreters, including using friends, family, and even minor children.
- Do not contract with a multi-lingual telephone-based interpreting service to provide immediate language access to LEP clients by telephone.
- Send English written correspondence to LEP clients, assuming that they will find someone to help interpret the letter for them.
- Do not train staff on how to work effectively with an interpreter.
- Have not designated anyone in particular at the program as responsible for coordinating the program's language services and monitoring its practices.

It is likely that this sort of conduct would substantiate a clear cut case of language based national origin discrimination in the eyes of most experienced civil rights staff working for federal agencies today.

LSC needs to understand that programs lacking policies and procedures to make themselves accessible to LEP clients will unintentionally but in practice discriminate against clients based upon their English language ability, a recognized proxy for national origin. Such clients may be denied service by the program in a variety of ways: no telephone service, including intake, is available to them; they cannot obtain advice or representation; services provided are delayed or otherwise inferior compared to English speaking clients; they are not afforded the chance to read intake forms, pleadings and other documents before signing them; they are not given the benefit of letters explaining advice or developments in a case; they cannot have private conversations with their advocates; they have never been informed of the very existence of the program. LSC's push towards centralized telephone intake may well have served to strengthen language barriers because little has been done to assure the immediate availability of telephone interpreters.

Programs without good language policy tend to use two inappropriate alternatives to communicate with clients. One is to speak and send letters to clients in English only, despite the fact that the client cannot understand much of what is said and is unable to fully explain the facts in English. The other manner of handling the problem is to rely upon "interpreters" provided by clients, typically friends or family, including the client's minor children. These interpreters typically lack strong language skills in one or both languages and may not have sufficient experience or education to understand rudimentary concepts about courts and litigation. Even in the rare instance that a client's friend or family member is fully fluent in both English and the source language, she will in all likelihood not be trained regarding the basic role of an interpreter to serve as a mere conduit of information -- adding nothing, omitting nothing, and changing nothing. Friends and family more typically serve as a filter, summarizer, or advocate, providing what information they believe will be most helpful to the client. Finally, conflicts of interest may exist between family members who interpret and clients who rely on them, and these conflicts may influence, however slightly, how information gets interpreted. As a result of all these factors, use of friends and family as interpreters

may seriously distort communication between a casehandler and a client.

Programs that permit inadequate communications with LEP clients place themselves at risk in terms of their responsibility to represent clients competently. Decisions about case acceptance, referral, representation, negotiation, and litigation cannot be made in a professional manner when the advocate cannot be assured that the client has given her all the relevant information. To proceed in the absence of assured communication with the client may constitute malpractice. Advising a client unable to speak, read or write English proficiently to use pro se or self help remedies may be tantamount to denying service altogether. And LEP clients should, like English speaking clients, have the right to privacy in discussions with advocates, including the right not to have interviews in which friends or relatives are forced to participate for lack of professional interpreting. Imagine the situation of an LEP client with an SSI or family law case who is forced to discuss intensely personal and private information in front of her child or neighbor.

LSC should not draw any conclusions from the low number of complaints it apparently has received about discrimination against LEP clients. LEP clients unaware of or unable to get good service from LSC grantees are not likely to have knowledge of the existence of LSC, the ability to communicate a complaint to LSC, or knowledge that their right to be treated without discrimination has been violated. Nor would we expect the Corporation to be equipped as it should be to receive complaints in languages other than English.

2. WE RECOMMEND THAT LSC ISSUE AN LEP GUIDANCE

Taking into account the pressing needs of LEP clients, the spotty record of compliance nationally among programs and the uniform path taken by various federal agencies, we view issuance of a guidance as clearly the best option to be taken by LSC. The other four options set forth by LSC have sufficient weaknesses that they should be rejected out of hand.

Numerous federal departments and agencies have, as ordered by the President in Executive Order 13166, issued guidance on language access applicable to recipients of their funding over the past few years. The guidances vary from agency to agency, but tend to follow similar formats. They explain the legal basis for the guidance, the requirements imposed on recipients, and provide examples of how to apply general policy to particular situations. The guidances are published and revised in response to public comment. Once issued, the guidance represents the stated policy of the agency and sets the standard for language access. Issuance of guidance is the uniform manner in which all other departments and agencies have responded to the Executive Order. Departure from this accepted practice should be proposed only in response to strong and well articulated reasons and no such reasons seem to exist.

In concluding that a guidance is appropriate, we reject the Corporation's suggestions that guidance is "non-binding" or that it should consist of non-mandatory, non-regulatory "best practices". As we later discuss, LSC has the clear authority to enforce a LEP guidance focused on what recipients must do to effectively serve LEP clients and thereby avoid national origin discrimination. The guidance should set forth the LSC standard for performance in serving LEP

clients and make clear that it expresses mandatory requirements subject to enforcement. This approach has the benefit again of making the LSC guidance similar to those issued by federal departments and agencies. It also acknowledges the reality that many programs across the country are not in full compliance with accepted standards. Merely gathering suggestions that programs are free to ignore will serve as a tacit endorsement by LSC of discriminatory conduct by grantees.

Just as issuance of guidance is consistent with accepted practice, the use of regulations is not, and should be undertaken only for reasons that justify departure from the norm in a field in which LSC has little expertise. Regulations are more cumbersome to draft and approve and, once adopted, are more difficult to correct and update. We believe that using regulations would also delay action in an area in which the LSC has been embarrassingly slow already. In addition, the history of the relationship between the Corporation and field programs suggests that standards contained in regulations are likely to be more controversial and less accepted in the field than identical standards set forth in a guidance. Given that guidance can be enforced, there is no apparent benefit to use of regulations and we therefore urge LSC not to issue regulations.

Adopting by reference the DOJ guidance is also not the best solution, although it is probably the second best. This does have the benefit of setting forth a reasonable set of standards, and agencies are trying to stay as close to the DOJ guidance as possible to assure that uniform standards are required of entities that receive federal money from more than one source, as do many legal services programs. The disadvantage of adopting the DOJ guidance is that it is generalized to cover the diverse entities that receive DOJ support. In contrast, LSC funds entities that engage in the same activity, i.e. the provision of free legal services to indigent clients. We envision an LSC guidance that is tailored to the needs and problems particular to legal services programs and think it obvious that such guidance would be more useful to programs than DOJ's. Of course, LSC must craft its more specific guidance in a manner consistent with the more general framework set forth in the DOJ guidance so that recipients simultaneously adhere to the DOJ guidance when they follow the LSC guidance.

Doing nothing is not acceptable. This approach rests in part on the dubious legal foundation that neither LSC nor its grantees are recipients of federal financial assistance subject to Title VI. But even if LSC and its recipients could legitimately claim immunity from such civil rights protections, it has acknowledged that the grantees are contractually bound to avoid national origin discrimination. Presumably, LSC will in addition recognize its own duty to act to protect the civil rights of the indigent to obtain legal services in a non-discriminatory matter. A decision to do nothing about language access would abdicate LSC's responsibility to protect the civil rights of clients who are among the most vulnerable of the poor, would not correct LSC's failure to provide leadership in this area, and would ratify the widespread non-compliance of field programs.

3. LSC HAS ENFORCEMENT AUTHORITY

LSC possesses ample authority to enunciate and enforce a guidance clarifying the obligations LSC programs have to ensure that LEP clients can meaningfully access their services. As LSC's

request for comment notes, each LSC grantee has a contractual obligation to ensure that it is properly serving LEP clients, since each program signs a grant assurance under which it promises not to discriminate on the basis of national origin. As such, it is perfectly appropriate for LSC to better define for its grantees what steps they must take to ensure that their programs do not inadvertently discriminate on the basis of national origin by failing to provide bilingual staff or interpreting and translating assistance needed to overcome language barriers to service.

One clear method for investigation and enforcement is LSC's procedures on termination and debarment, 45 CFR §1606.1 et. seq. The purpose of these procedures is to "Ensure that the Corporation is able to take timely action to deal with incidents of substantial non-compliance with ...the terms and conditions of the recipient's grantor contract with the Corporation." (§1606.1) The Corporation could initiate "termination" proceedings (defined as a reduction in funding in whole or part) against a program that substantially violates its obligation not to discriminate on the basis of the national origin. See §1606.3(a)(1). Independently, termination proceedings could be initiated against a program that substantially violates a LSC guideline or instruction, such as a guideline or instruction on services to LEPs. *Ibid.* Finally, termination proceedings could be initiated where "there has been a substantial failure by the recipient to provide high quality, economical, and effective legal assistance, as measured by generally accepted professional standards ... or a guidance issued by the Corporation". §1606.3(a)(2). Termination on one of these grounds could then also lead to "debarment," a bar to future funding. See §1606.4(b)(2).

To be clear, we are not suggesting that LSC actually employ the heavy-handed measure of termination procedures as a routine method of enforcing a LEP guidance. LSC should provide programs with concrete support and feedback where it learns of deficiencies in services to LEPs, and should offer reasonable opportunities for the program to take corrective measures before the question of initiating termination proceedings is even raised. Indeed, the regulations suggest that termination procedures based on substantial violation shall generally be initiated only where a recipient's "violation was knowing and willful" and "the recipient failed to take action to cure the violation when it became aware of the violation." §1606.3¹.

While LSC's authority to enforce a LEP guidance appears clear, we agree with LSC's own observation that its Office of Compliance and Enforcement currently lacks experience in enforcement of LEP guidelines. We would expect LSC to include in the guidelines some bright-line standards that enable both LSC and its recipient programs to clearly ascertain whether a program is in compliance. LSC should invite advocates with experience with language access issues, legal services staff, LSC clients, and other stakeholders to assist LSC in its efforts to craft, provide

¹ Even once a preliminary determination that there exists grounds for termination or debarment has been made, there are due process steps that LSC should take before terminating or debaring a program, including exploring the possibility of continued funding based on corrective action. See §1606.7(d); §1606.9(2). Programs should be given reasonable opportunity at this stage to improve their practices towards LEPs.

support for and enforce LEP guidelines. It is essential that experienced field staff and others with expertise in language access be involved in assisting programs seeking to improve, monitoring programs and enforcement activities. Furthermore, we urge LSC to seek technical guidance from federal agencies such as DOJ and EEOC which have more experience with civil rights enforcement and LEP issues.

4. LSC SHOULD OFFER LEADERSHIP AND ASSISTANCE TO FIELD PROGRAMS TO DEVISE AND IMPLEMENT NEW LANGUAGE POLICY.

LSC shares responsibility with field programs for the failure to address the needs of limited English proficient clients. It is revealing that it has taken LSC over two years since the issuance of the Executive Order to simply begin the process of determining whether it ought to act. Since August 2000 some thirty federal departments and agencies have issued guidance to recipients and/or set out formal policy for assuring that LEP persons have access to their own programs and benefits. LSC's failure of leadership is hypocritical when, despite its stated mission to "promote equal access to the system of justice," it seems to have done nothing to assure that LEP clients are given equal access to LSC funded services. Many legal services advocates have gained expertise in recent years in enforcing the rights of LEP clients to obtain meaningful access to government, the courts and government funded programs. Our ability to advocate is severely undermined when our own programs are not in order.

We urge that LSC accept responsibility for its past failure to act by providing much needed leadership and support to field programs at the same time that change is mandated through issuance of guidance. There are numerous ways in which meaningful support could be provided. Some examples:

- ▶ Develop model language policies, protocols, posters, brochures and forms.
- ▶ Negotiate master contracts in order to obtain favorable rates for programs to obtain in person interpreting, telephone interpreting and translation services.
- ▶ Make grants available to programs to cover the costs of making themselves accessible to language minorities.
- ▶ Provide programs with client database software which is customized to allow for better tracking of LEP clients, costs incurred to serve them and the services that they receive.
- ▶ Fund state or regional training conferences for field staff and managers on topics such as language access policy, interpreting skills and translating skills (for bilingual staff), and how to work effectively with interpreters.
- ▶ Hire staff or consultants with expertise in language access to provide training and consultation for field programs.
- ▶ Consider factoring in low income LEP population figures as a component of funding local programs.
- ▶ Contract for a nationwide customized data analysis that extrapolates from Census data counts of income eligible LEP persons broken down according to existing

program boundaries and language spoken and, within each program area, providing further data so that LEP client populations can be identified by geographic location.

Providing such centralized support is beneficial for a number of reasons. By centralizing some aspects of funding, research and policy development, it places the cost of implementation where it belongs and where economies are most easily achieved. It further recognizes the reality that compliance with the guidance requires expenditures of funds and that cost is one reason why some programs are not doing as well as they might. It also minimizes the amount of staff time that must be invested in each program to do essentially the same tasks. LSC should avoid the costs and disincentives associated with forcing each program to “reinvent the wheel” on language access, while at the same time supporting the independence of field programs by allowing them to tailor policy and practice to local needs.

Please feel free to contact us to further discuss these important issues.

Sincerely,

PAUL M. UYEHARA
JONATHAN M. BLAZER
Staff Attorneys
Language Access Project

cc: Original hard copy, by mail.

Appendix 1

Self-Assessment on the Accessibility of your Program/Office to Clients with Limited English Proficiency

(1) Has your program assessed which foreign languages it most frequently encounters in its client community?

What is the second most frequently encountered foreign language (e.g., after Spanish)?

(2) Does your program's client database track the preferred language of its clients?

Is language a mandatory data field?

(3) Does your program focus on legal issues of particular import to immigrant and other limited English communities?

For example, does your program engage in language rights advocacy and problems relating to immigration status?

(4) Does your program have a written policy on services to people with limited English proficiency?

(5) Does your program encourage clients to bring friends and family members to interpret for them?

(6) Does your program permit minor children to interpret for their parents?

(7) Does your program contract with a telephone-based interpreting service to assist in foreign language communications with clients by telephone?

(8) Do you send translations of written correspondence to limited English proficient clients?

In a full range of languages?

(9) Have case-handling staff been trained on how to work effectively with an interpreter?

(10) Is there a staff person or group of persons responsible for coordinating the program's language services and monitoring its practices?